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IN THE

Supreme Court of the United States

October Term, 1959.

No. 685

MITCHELL S. MOHR, an Individual Trading and Doing Business as NATIONAL RESEARCH COMPANY, and SYDNEY FLOERSHEIM, an Individual Trading and Doing Business as S. FLOERSHEIM SALES COMPANY,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 16, 1959, whereby an order of the Federal Trade Commission reopening a proceeding involving the petitioners and modifying a cease and desist order was affirmed; and to review the judgment as modified on December 7, 1959, whereby the order of the Federal Trade Commission was affirmed and a decree was entered enforcing in whole the said order of the Federal Trade Commission; the Petition for Rehearing was denied on December 29, 1959. [Tr. of R. pp. 180-194.]

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the order of the Federal Trade Commission reopening the proceeding involving the petitioners and modifying the cease and desist order, is set forth as Appendix "A" (the decision is not reported at this time).

A Petition for Rehearing and Request for Hearing *En Banc* in the United States Court of Appeals for the Ninth Circuit were denied on December 29, 1959 [Tr. of R. p. 194]; (the order denying rehearing is not reported at this time).

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered November 16, 1959. The Petition for Rehearing was denied by said Court on December 29, 1959. The issues presented here were urged in the Circuit Court.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254.

Questions Presented.

1. Does the order of the Federal Trade Commission come within the classification of preventing the use of "unfair or deceptive acts or practices in interstate commerce," as set forth in Title 15, United States Code, Section 45?

2. Was there a sufficient showing since the issuance of the original order of changed conditions of fact or of law or that the public interest required the reopening of the proceedings and modification of the original order?

3. Is the Federal Trade Commission estopped from modifying its original order by failure to act within a reasonable time after accepting petitioners' Compliance Report?

4. Did the Federal Trade Commission err in finding that the cards used by petitioners have the tendency and capacity to mislead and did mislead and deceive the recipients?

5. Did the Federal Trade Commission err in finding that the original order gave rise to confusion and controversy as to the compliance required?

6. Was error committed in overruling the objections of the petitioners to the admission of evidence?

7. Is the modified order of the Federal Trade Commission too broad in its requirements?

Statute Involved.

". . . The Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action, or if the public interest shall so require. . . ."

Title 15, *U. S. C.*, Sec. 45(b).

Statement of the Case.

Petitioners filed a petition to review and set aside the order of the Federal Trade Commission entered November 14, 1938, wherein the Federal Trade Commission ordered that the proceeding before the said Commission under Docket No. 6236 be reopened and the Order to Cease and Desist issued June 1, 1936, be modified by

striking from the Order Paragraph 1 of the initial decision, to-wit:

> "Using or placing in the hands of others for use, any form, questionnaire, or other material printed or written, *which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors*" (italics ours),

and substituting therefore the following:

> "Using or placing in the hands of others for use, any forms, questionnaires or other materials, printed or written, *which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors*" (italics ours).

Statement of Facts.

The Federal Trade Commission, on or about June 1, 1956, in its Docket No. 6236, issued an order which, in Paragraph 1 thereof required the petitioners to cease and desist from

> "using or placing in the hands of others for use, any form, questionnaire, or other material, printed or written, *which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors;*" [Tr. of R. pp. 3-4; italics ours].

That thereafter and within the time provided for by law, to-wit, on July 26, 1956, the petitioners submitted their Compliance Report. [Tr. of R. pp. 8-12.]

Thereafter, on August 1, 1956, the General Counsel of the Commission advised petitioners by letter that on the

basis of the representations made and the evidence furnished, it appeared that the petitioners were in compliance with the Order and the report was received and filed. [Tr. of R. pp. 13-14.]

Thereafter, on or about February 6, 1958, the Commission issued an order for the petitioners to show cause why the public interest did not require the Commission to reopen the proceeding and alter its order in part by modifying Paragraph 1 of the Order to Cease and Desist dated June 1, 1956. [Tr. of R. pp. 3-5.]

The petitioners filed an answer alleging:

1. That a Report of Compliance had been filed, which was accepted by the Commission;

2. That the activities of the petitioners since the Order of Compliance were in accordance with the Compliance Report or the principles thereof;

3. That the Commission did not have jurisdiction or authority to modify the Order to Cease and Desist in that the proposed modification did not come within the classification of preventing the use of "unfair or deceptive acts or practices in interstate commerce."

4. That the Commission did not have jurisdiction or authority to proceed to modify the original Order to Cease and Desist in that there was no showing, since the issuance of the original Order, that there were changed conditions of fact or of law or that the public interest required the reopening and modification of the Order;

5. That the petitioners did not engage in any activities constituting unfair or deceptive acts or practices in interstate commerce. [Tr. of R. pp. 6-7.]

That oral argument was held before the Commission on April 28, 1958. An affidavit of Mitchell S. Mohr was

filed with the Commission on or about May 5, 1958, setting forth the activities of the petitioners. [Tr. of R. pp. 12-17.]

That on May 22, 1958, the Commission issued an Order remanding the case to the Hearing Examiner for the purpose of receiving evidence on the question of whether conditions of law or fact have so changed as to require a change of the original Order to Cease and Desist, or if the public interest so requires. [Tr. of R. pp. 18-19.]

That the Hearing Examiner conducted a hearing on or about July 28, 1958, at which time evidence was received. [Tr. of R. pp. 84-107.]

That on September 12, 1958, the Hearing Examiner submitted his report and recommendation to the effect that Paragraph 1 of the original Order to Cease and Desist be modified. [Tr. of R. pp. 27-34.]

That thereafter on November 14, 1958, the Commission issued its order reopening the proceeding, and modified the original Order to Cease and Desist by striking Paragraph 1 and substituting therefor

> "Using, or placing in the hands of others for use; any forms, questionnaires or other materials, printed or written, *which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors.*" [Tr. of R. pp. 42-43; italics ours.]

That the evidence taken by the Hearing Examiner is summarized as follows:

1. Petitioner Mitchell S. Mohr was doing business under the name of National Research Company, located in Washington, D. C.

2. Petitioner Sydney Floersheim was doing business under the name of Sydney Floersheim Sales Company located at Los Angeles, California.

3. Petitioners were engaged in the business of selling forms and services.

4. The forms were sold throughout the United States and are mailed from Washington, with answers received in Washington being forwarded to the clients of petitioners, and that the volume of business is substantial. [Tr. of R. pp. 84-85.]

5. Exhibits 1 to 17 inclusive were introduced in evidence as constituting the forms being sold by petitioners. [Tr. of R. pp. 86-87.] Exhibits 19 and 20, being sales materials of petitioners, were introduced in evidence. [Tr. of R. pp. 87-88.]

6. Norman Witkin, a former Government employee, and William B. Tuttle, a resident of Alexandria, Virginia, assistant manager of the Metropolitan Life Insurance Company, were shown Exhibits 4, 5 and 6, and would not know why the information thereon was requested; they did not receive any of the forms through the mail. [Tr. of R. pp. 120-128.]

7. Robert Van Derveer, a Government employee, was shown Exhibits 4 and 6, and would not know why the information thereon was requested; he did not receive any of the forms through the mail. [Tr. of R. pp. 130-133.]

8. Mary Boswell, a former Government employee and a native Washingtonian, was shown Exhibits 7, 10 and 11 and would not know why the information thereon was requested; she did not receive any of the forms through the mail. [Tr. of R. pp. 111-115.]

9. George Baltimore, a Government employee, was shown Exhibits 7, 10 and 11, and would not know why the information thereon was requested; he would answer

the cards if a self-addressed, stamped envelope were furnished; he did not receive any of the forms through the mail. [Tr. of R. pp. 115-119.]

10. Thomas Nowlin, a Government employee, was shown Exhibits 10 and 11, and would not know why the information thereon was requested; he did not receive any of the forms through the mail. [Tr. of R. pp. 134-136.]

11. Arthur E. Cook, a Government employee, and Richard Riggle, a former Government employee, were shown Exhibits 12 and 13, and had no idea why the information thereon was requested; they probably would answer the cards if a self-addressed, stamped envelope were furnished. [Tr. of R. pp. 88-93.]

12. Samuel Bailey, who has lived in the District of Columbia for twenty-seven years, was shown Exhibits 12 and 13, and would not know why the information thereon was requested; he would answer the card if a self-addressed, stamped envelope were furnished; he did not receive any of the forms through the mail. [Tr. of R. pp. 94-99, 106-107.]

13. Linda Laney, a resident of the District of Columbia; Lillian Thomas, a resident of the District of Columbia, and Fred Marshall, a Government employee, were shown Exhibits 12 and 13, and would not know why the information thereon was requested; they did not receive any of the forms through the mail. [Tr. of R. pp. 100-106, 108-111.]

All of the testimony pertaining to whether the witnesses knew what the cards were for or whether they would answer them, was elicited over the objections of the petitioners, duly noted at the time of the hearing, and which objections were overruled by the Hearing Examiner. [Tr. of R. pp. 88, 89, 90, 91, 92, 94, 95, 100, 104, 105, 108, 112-116, 117, 118, 120, 121, 123, 124, 130, 131, 134, 135.]

ARGUMENT.

I.

The Order of the Federal Trade Commission Does Not Come Within the Classification of Preventing the Use of "Unfair or Deceptive Acts or Practices in Interstate Commerce."

Petitioners are not attacking the original order of June 1, 1956, requiring the petitioners to cease and desist from using certain materials.

The petitioners complied with the original Cease and Desist Order and submitted its Compliance Report within the time provided for by law, to-wit, July 26, 1956. This Compliance Report was accepted by the Federal Trade Commission on August 1, 1956.

The petitioners do object to the order dated November 14, 1958, reopening the proceedings and modifying the original order.

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful, and the Federal Trade Commission has the authority to issue Cease and Desist Orders after due proceedings for the purpose of putting a stop to the unlawful acts.

Title 15, *U. S. C.*, Secs. 45(a), (b).

". . . The Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action, or if the public interest shall so require. . . ."

Title 15, *U. S. C.*, Sec. 45(b).

The Federal Trade Commission may exercise only powers granted to it.

Federal Trade Commission v. National Lead Co. (1957), 77 S. Ct. 502, 508.

The modified order goes far beyond requiring the petitioners to cease and desist from using alleged deceptive acts or practices in commerce.

The difference between the original order of June 4, 1956, and the modified order of November 14, 1958, is that the original order requires that the material used by the petitioners cannot represent directly or by implication that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors; whereas the modified order of November 14, 1958, requires that the material used by petitioners shall clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors.

In short, the modified order requires the petitioners to state affirmatively that the information requested is for the purpose of obtaining information concerning delinquent debtors.

It is respectfully contended that the original order meets the requirements of Section 45 of Title 15 of the *United States Code* in requiring the petitioners to refrain from using deceptive acts or practices in commerce. The section referred to does not empower the Federal Trade Commission to go further by requiring an affirmative disclosure as to the purpose for seeking the information.

The Court in its Decision (P. 6) states:

"It was proper for the Commission to conclude from the substantial response to these forms that the

effect of omitting an affirmative statement of purpose therefrom was to cause recipients to take action they would not otherwise have taken."

Petitioners contend that as a matter of law neither the Commission nor the Court have the right to infer deception against the petitioners, or that people will only answer questions of this character provided they are deceived.

II.

There Was No Sufficient Showing of Changed Conditions of Fact or of Law or That the Public Interest Required the Reopening of the Proceedings and Modification of the Original Order.

As stated above, the Federal Trade Commission may exercise only powers granted to it by Sections 41-58 of Title 15, *United States Code*. Therefore, under Section 45(b) it is necessary that there be a showing of changed conditions of fact or of law, or that the public interest requires the reopening of the proceedings and modification of the original order. It is respectfully suggested that the record falls far short of such a showing.

No evidence was introduced to show changed conditions of fact or of law since the issuance of the original order.

Counsel for the Federal Trade Commission appeared content to rest his case on the calling of twelve witnesses and the introduction of the forms used by the petitioners for the purpose of establishing that public interest required the reopening of the proceedings and modification of the original order.

The testimony of the witnesses over the objections of the petitioners, however, merely demonstrated that they

did not know the purpose of the cards and that some of them would probably answer the questionnaires if they had received them. There was no showing that the cards tended to mislead the recipients, or that any of them were mislead, or that any of them thought that they were forms coming from the government, or were forms for any purpose other than that of obtaining information concerning delinquent debtors.

Petitioners concede that the Federal Trade Commission, under the decisions, has the authority to prevent dishonest methods being used by creditors to collect their debts.

> Federal Trade Commission's conclusion that it is in the public interest to require that creditors should not use dishonest methods in collecting their debts is within Commission's discretion.
>
> *Dejay Stores v. Federal Trade Commission* (C. C. A. 2, 1952), 200 F. 2d 865, 867.
>
> The prevention of perversion of interstate commerce by use in interstate commerce of unfair and deceptive practices to obtain for creditors or collection agencies information concerning debtors is "in the interest of the public" within the meaning of this section, so as to authorize a cease and desist order.
>
> *Silverman v. Federal Trade Commission* (C. C. A. 9, 1944), 145 F. 2d 751, 753.

It is one thing, however, to hold that it is in the public's interest to prevent a person from using unfair or deceptive acts or practices in commerce by prohibiting the use of material which gives the impression that the purpose for which the information is sought is other than that of obtaining information about delinquent debtors; and it is still

another thing to hold that it is in the public's interest to require a person when seeking information concerning delinquent debtors to state affirmatively that that is his purpose.

Petitioners contend that the public interest does not require the affirmative declarations. It is that particular phase that prompts the petitioners to urge that there is no showing of public interest so as to require the modification of the order.

Public interest must be specific and substantial to justify proceeding by Federal Trade Commission to prevent unfair competition, mere representations and confusion or deception of purchaser being insufficient.

Federal Trade Commission v. Royal Milling Co. (1933), 53 S. Ct. 335, 336;

Educators Association v. Federal Trade Commission (C. C. A. 2, 1939), 108 F. 2d 470, 473;

Arnold Stone Co., Inc. v. Federal Trade Commission (C. C. A. 5, 1931), 49 F. 2d 1017, 1019.

A proceeding by the Federal Trade Commission to prevent the use of unfair methods or unfair or deceptive acts or practices in commerce must appear to be in the interest of the public.

Thomas v. Federal Trade Commission (C. C. A. 10, 1940), 116 F. 2d 347, 349;

National Silver v. Federal Trade Commission (C. C. A. 2, 1937), 88 F. 2d 425, 427.

Practice, though unethical, would still be beyond purview of this section if lacking public interest necessary to support Commission's jurisdiction.

Northam Warren Corporation v. Federal Trade Commission (C. C. A. 2, 1932), 59 F. 2d 196, 198.

The Court in its Decision (P. 5) states: "The public interest requires that a Cease and Desist Order be clear and explicit in all of its terms." With this contention petitioners have no quarrel. However, they maintain that the original Cease and Desist Order was clear and explicit when it stated that the petitioners should not use any forms "which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors." Nothing could be clearer than that.

However, the Court goes on to say in its Decision (P. 5) that "'the record . . . amply supports the Commission's assertion that the outstanding order had given rise to confusion and controversy." The Court further states (P. 5) that the Commission had the intention to require discontinuance of the use of forms "which do not make the recipients aware of the true purpose for which information is being requested."

With this contention petitioners disagree, and respectfully urge that the record is silent insofar as competent evidence is concerned to show that the Commission originally intended to have the forms state "the true purpose for which information is being requested."

It is clear that what the Commission is attempting to do is to change the original order, not to clarify it. The original order needed no clarification. It was clear to the

Commission. It was clear to the petitioners, and it was obviously clear to the Compliance Division of the Federal Trade Commission when it accepted the Compliance Report of the petitioners on August 1, 1956.

The Court in its Decision (P. 5) relies to a great extent on the contention that the original order gave rise to confusion and controversy. However, no showing has been made who was confused, or where, if any, controversy existed.

The record is completely silent that any recipient of the form was confused or was a party to any controversy.

To be realistic all parties concerned should admit that there was no confusion or controversy even on the part of the Commission. The Commission merely wanted to change the order and add something to it by requiring an affirmative disclosure.

The Court very aptly asks (P. 7), "One may wonder why, if the Commission's original intention was to require an affirmative disclosure of purpose, it did not find a more forthright way to say so in its original Cease and Desist Order."

The Court's own question is the answer to this entire matter. The Commission with its years of experience, the expertness of its staff, and its knowledge of drawing orders cannot be considered inept. This is not a case of "ineptness of expression", as the Court infers in its Decision (P. 7); the Commission knew what it wanted to say and said it. Now, having said what it wanted to say in the original order, it is necessary to make a showing of changed conditions of fact or of law, or that the public interest required the reopening of the proceedings in order to come forth with a modification of the original order.

The Court in its Opinion (P. 7) holds in effect that even if the Commission was merely changing its mind, that it had a right to do so if the original order was not sufficient to stop the "deception". The difficulty is that the Court, like the Commission, jumps to the conclusion that there is deception. There is no showing in the record that anyone was deceived. There is no showing that any recipient was deceived. The best that can be said for the Commission's order is that the record contains testimony of non-recipients that they would have answered the forms if they had received them. This does not amount to deception. There can be no inference of deception against the petitioners in the absence of a showing that someone was deceived.

A great deal is made of the point that the Commission should act "to protect the public interest". Petitioners do not quarrel with the contention that it is in the public interest to stop deception. But the Commission in its zealous effort to act "to protect the public interest" should also keep in mind that the public interest is being protected when steps are taken to require deliberate defaulting debtors to pay their just obligations. As long as the forms do not deceive and are clear requests for information, the Court's ruling in upholding the Commission's order banning the use of the particular forms used by the petitioners as disclosed in the Transcript of Record, [pp. 144-160] is not warranted.

The basis of the Commission's ruling and the affirmation by the Court is that the cards used by petitioners have a tendency and capacity to mislead. However, there is no showing that any recipient of the cards thought the forms were something other than request for information. There is no showing that any recipient thought

the cards came from anyone other than a private organization. There is no showing that any recipient answered the questionnaires because of any deception practiced on him. The Court apparently is of the opinion (P. 6) that people do not ordinarily supply information when they know it will be used against them. This conclusion is contrary to experience. Many persons confess the commission of crimes when being investigated or when under arrest. They know it will be used against them, but they still confess or at least make damaging admissions. To carry the Court's opinion to its logical conclusion it must hold that every confession made by a prisoner cannot be used in evidence because "no person would make a statement knowing that it was going to be used against him."

It would be a sad commentary if we are to conclude that only deception would cause a person to answer questions where the answers might be used against him. Common experience tells us that people are used to answering questionnaires and there is nothing in the record to show that the response made to the forms was the result of any deception being practiced on the recipients.

When we look at the forms [Tr. of R. pp. 144-160], we see that there is nothing deceptive about them. For example, Exhibit "A" tells the amount past due and tells the recipient to take the form to the creditor's office. It gives the name of the creditor and the address. Surely there is nothing deceptive about this.

Exhibits "B" and "C" are in the same category.

Exhibits "N" and "O" show a creditor-debtor relationship.

They tell the addresee to take the form to the creditor's office.

Exhibit "Q" states on it "Collection Information".

Surely any recipient receiving any of the above mentioned forms is put on notice that the form deals with collections or debts. As far as the other exhibits are concerned, they are simple requests for information pertaining to the individual's status.

III.

The Federal Trade Commission Is Estopped From Modifying Its Original Order by Failure to Act Within a Reasonable Time After Accepting Petitioners' Compliance Report.

The Compliance Report to the original Cease and Desist Order is dated July 26, 1956. The report was accepted by the Commission August 1, 1956.

It was not until February 6, 1958, that the Commission issued an order for the petitioners to show cause why the public interest did not require a reopening of the proceedings and a modification of the original order. It was not until November 14, 1958, that the original order was modified.

> Order of Federal Trade Commission which directed petitioner to cease and desist from certain deceptive and unfair trade practices, and which was entered 12 years after commencement of proceedings before Commission, more than 6 years after last evidence was taken, and 9 years after petitioner has ceased handling publication which was basis of practices charged, would be vacated on motion by petitioner.
>
> *New Standard Pub. Co. v. Federal Trade Commission* (C. C. A. 4, 1952), 194 F. 2d 181, 183.

> A complaint may be filed under the act only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public," and this requirement is not satisfied merely by proof that there has been misapprehension and confusion on the part of the purchaser, or even that they have been deceived. To justify filing a complaint the public interest must be specific and substantial.
>
> *Federal Trade Commission v. Klesner* (1929), 280 U. S. 19, 27.

In the *Klesner* case the desist order was entered two years after the complaint was filed. The suit to enforce the Commission's order was begun nearly nine years after institution of conduct complained of.

While it is true that the lapse of time in the instant case was not as great as that in the *Klesner* case, nevertheless the same principle applies.

The Commission should not be permitted to wait unduly before instituting proceedings, particularly when the Commission by its own act, through acceptance of the Compliance Report, in effect assured the petitioners that they were complying with the Order to Cease and Desist.

To permit the Commission to take the action which it did would be sanctioning lulling the petitioners into a false sense of security.

No review of the original order was taken since the Compliance Report was accepted by the Commission. It would be most unfair to permit the Commission to accept a Compliance Report, and after the time to petition for review the original order has expired, and after the petitioners are engaged in a course of conduct consistent with

the Compliance Report, to bring proceedings to modify the original order. In this case the Commission waited a year and a half after accepting the Compliance Report to bring proceedings to modify the original order; and the Order of Modification was not made until more than two years after the acceptance of the Compliance Report.

The Court in its Opinion (P. 8) states that the petitioners "are not aggrieved by the fact that they have been originally lulled into inaction by the General Counsel's letter of August 1, 1956." In reality, however, they have been aggrieved because they gave up their right to review the original Order to Cease and Desist. All that the petitioners were able to do in view of what had transpired was to petition for a review of the modified order.

IV.

The Federal Trade Commission Erred in Finding That the Cards Used by Petitioners Have the Tendency and Capacity to Mislead and Did Mislead and Deceive the Recipients.

It should be noted that not a single recipient of the materials was called to testify. Each and every witness used by the Commission resided in the District of Columbia or in the nearby vicinity, and in many instances they were either Government employees or former Government employees. On being shown various exhibits their testimony was merely to the effect that they did not know why the information was being sought as indicated on the card and that if they had received such a request some of them probably would have answered the cards.

The evidence is clear that none of the witnesses ever received the cards; none of the witnesses was actually misled; none of the witnesses thought that the cards came

from any Government agency; none of the witnesses thought the information sought was for a purpose other than to obtain information concerning delinquent debtors. In short, none of the witnesses was misled nor did the cards have a tendency or capacity to mislead them.

> Whether the public were misled, and not whether they should have been misled, is the test of the power of the Federal Trade Commission to enter order for protection of public.
>
> *Parke, Austin and Lipscomb v. Federal Trade Commission* (C. C. A. 2, 1944), 142 F. 2d 437, 441.

> Where ordinarily prudent persons are not misled, no relief for alleged unfair competition is warranted and none will be granted.
>
> *American Photographic Pub. Co. v. Ziff-Davis Pub. Co.* (C. C. A. 7, 1943), 135 F. 2d 569, 574.

> Ultimate determination of what constitutes unfair competition is for Court, not for Federal Trade Commission.
>
> *Motion Picture Advertising Service Co. v. Federal Trade Commission* (C. C. A. 5, 1952), 194 F. 2d 633, 636.

> The rule that the meaning of the phrase "unfair method of competition" is a question of law for the courts is not avoided by the Trade Commission's stating as a finding of fact what is a mere conclusion of law.
>
> *Standard Oil Co. of New York v. Federal Trade Commission* (C. C. A. 2, 1921), 273 Fed. 478, 481.

What constitutes unfair methods of competition within this section is question for final determination of court.

Federal Trade Commission v. Raladam Co. (1931), 51 S. Ct. 587, 652.

V.

The Federal Trade Commission Erred in Finding That the Original Order Gave Rise to Confusion and Controversy as to the Compliance Required.

Petitioners challenge respondent to point out any evidence whatsoever in the record to show that the original order caused any confusion or any controversy as to the compliance required. Petitioners respectfully contend that the record is completely silent on this score.

The Commission attempts to justify the finding that the public interest requires the reopening of the proceeding and modification of the original order on the assumption that there was confusion and controversy as to the compliance required under the original order.

But it is significant that not a single witness nor a single exhibit was introduced into evidence to show that there was any confusion or any controversy. The Commission merely jumped at a conclusion in making a finding of "confusion and controversy."

VI.

Error Was Committed in Overruling Objections to the Admission of Evidence.

It should be noted that the witnesses called by the Commission were not "delinquent debtors," nor were they "recipients" of the materials. Assumedly they were disinterested witnesses who are Government-conscious by virtue of their employment by the Government or place of residence in or near the nation's capital.

With that background or foundation, they were asked if they knew what their impression was as to why the information on the cards was being requested. This obviously called for a conclusion of the witnesses and it made no difference what their impressions were. The issue to be determined was whether or not any recipient of the material had actually been misled, or if an actual recipient of the card might have been misled as an ordinary prudent person.

To permit a witness to answer the question calling for his impression, when he was neither a delinquent debtor nor a recipient of the card was clearly objectionable on the grounds stated in the record.

VII.

The Modified Order of the Federal Trade Commission Is Too Broad in Its Requirements.

A cease and desist order of Federal Trade Commission requiring petitioner to cease and desist from "selling or distributing any merchandise so packed and assembled that sales of such merchandise to public are to be made or may be made by means of a game of chance, gift enterprise or lottery scheme" was too broad and would be modified by striking therefrom the phrase "or may be made."

Lee Boyer's Candy v. Federal Trade Commission (C. C. A. 9, 1942), 128 F. 2d 261, 262.

Portion of cease and desist order of the Federal Trade Commission requiring cigarette company to desist from making any representations "which are not factually true in all respects" was invalid because it went too far and was too broad.

R. J. Reynolds Tobacco Co. v. Federal Trade Commission (C. C. A. 7, 1951), 192 F. 2d 535, 538.

In the instant case the modified order goes beyond the requirement of refraining from using unfair or deceptive acts or practices in commerce. As contended hereinabove, it requires an affirmative declaration by the petitioners that their purpose in seeking the information is to obtain data concerning delinquent debtors. In this respect it is contended that the order goes too far and is too broad in its requirements.

Conclusion.

Counsel for petitioners has made a careful research of the law pertaining to the power of the Federal Trade Commission to reopen the proceedings and modify the original order. It appears that the circumstances of this particular matter place this case in the category of one of first impression. It is the opinion of the petitioners that the Court in its Opinion has decided this case in a way which conflicts with decisions of the Supreme Court cited in petitioners' Opening Brief. While it is true that the decisions of the Supreme Court are not on all fours with the present case, nevertheless the principles of law enunciated therein are applicable.

Because of the importance of the decision to be reached in this case and the fact that it is apparently a case of first impression insofar as the reopening of the proceedings by the Federal Trade Commission and the modification of the original Order to Cease and Desist are concerned, it is respectfully urged that a Writ of Certiorari should be granted

Respectfully submitted,

MURRAY M. CHOTINER,

Attorney for Petitioners.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Mitchell S. Mohr, an individual trading and doing business as National Research Company, and Sydney Floersheim, an individual trading and doing business as S. Floersheim Sales Company, Petitioners, vs. Federal Trade Commission, Respondent. No. 16,328. Nov. 16, 1959.

On Petition for Review and to Set Aside an Order of the Federal Trade Commission.

Before: Orr, Barnes and Hamley, Circuit Judges.

HAMLEY, Circuit Judge:

This matter is before us on the petition of Mitchell S. Mohr and Sydney Floersheim to review and set aside an order of the Federal Trade Commission. In this order the Commission reopened a proceeding involving petitioners, and modified a cease and desist order which had been entered therein.

Petitioners argue here that on the showing made the Commission was without jurisdiction or authority to reopen the proceedings. They also contend that the Commission was estopped to modify the original order; that the modified order is too broad, considering the facts of the case and the scope of the act; that certain Commission findings are insupportable; and that evidence was erroneously admitted at the Commission hearing.

Mohr and Floersheim are engaged in the business of selling and distributing in interstate commerce so-called skip-trace forms. (1) These forms are intended to be used

by creditors and collection agencies in obtaining information concerning the whereabouts of defaulting debtors. The forms are sent to the last known address of the debtors in the hope that the debtors will return them with the desired information. If this information is supplied, the creditors or collection agencies are enabled to proceed with their collections.

In a complaint filed with the Commission on October 11, 1954, it was charged that the forms which Mohr and Floersheim were selling and distributing contained false and misleading statements and implications. It was alleged that as a result many persons were induced to give information which they otherwise would not have supplied.

Administrative proceedings were had, leading to the issuance of a decision and order sustaining the allegations of the complaint.[1] In the order Mohr and Floersheim were required to cease and desist from making certain specified representations, and to cease and desist from:

> "Using or placing in the hands of others for use, any form, questionnaire, or other material, printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors;"

The Commission order also required Mohr and Floersheim to file within sixty days a report indicating compliance with the cease and desist order. Petitioners did not petition this court to review the June 1, 1956, order.

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[1]Order of June 1, 1956, In the Matter of Mitchell S. Mohr, *et al.*, Docket No. 6236.

On July 26, 1956, they submitted a report of compliance to the compliance division, office of the Commission's general counsel. By letter dated August 1, 1956, the general counsel advised them that on the basis of the representations made in their report they were then in compliance with the cease and desist order.

On October 2 and 12, 1956, the Commission's assistant general counsel for compliance wrote to petitioners stating that their forms continued to create misunderstanding among some recipients. (2) It was indicated that the matter would be reviewed by the Commission. On February 13, 1957, the Commission wrote to petitioners advising that all forms submitted with the July 26, 1956, report of compliance were in violation of the cease and desist order.

On February 6, 1958, the Commission ordered Mohr and Floersheim to show cause why the public interest does not require that the Commission reopen Docket No. 6236 and alter the quoted paragraph of the cease and desist order to read as follows:

> "Using, or placing in the hands of others for use, any forms, questionnaires or other materials, printed or written, which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors."[2]

---

[2]This order to show cause contains several recitals, including the following:

> "WHEREAS, the Commission intended, and believed that it had, by said language, required respondents to discontinue use of skip-trace forms and materials which do not make the recipients aware of the true purpose for which information is being requested, thereby selecting, in the public interest, the remedy in its opinion most suitable to the correction of a deceptive act and practice charged in the complaint, and in which

After Mohr and Floersheim had filed a response to this show cause order, a hearing was held before an examiner at which a stipulation of facts, exhibits, and oral testimony were received.[3] The exhibits included copies of forms then being sold and distributed (3) by petitioners and certain sales materials. The oral testimony consisted of the testimony of twelve residents of the District of Columbia and the adjacent area. They were each shown copies of the forms being sold by petitioners, and testified that they could not determine therefrom why the information was being requested. None of these witnesses had actually received such a form through the mail. It was stipulated that during the first six months of 1958 approximately 700,000 forms were sold and approximately 80,000 of them were returned from the addressees.

On September 12, 1958, the hearing examiner made his report and recommendations, and certified the record to the Commission. In his report the examiner stated that it was apparent from the testimony of the twelve witnesses that none of them was aware that the purpose of these forms was solely to locate delinquent debtors.

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the respondents were found by the hearing examiner and the Commission to have engaged, namely, the obtaining of information concerning delinquent debtors by deceit, and

"WHEREAS, it now appears to the Commission that there is reasonable doubt that the language of Paragraph 1 of said order has remedied the foregoing situation and will effectuate its said intent and purpose to remedy it, in that such language appears to be susceptible to the interpretation that it merely requires respondents to refrain from affirmatively stating any purpose, thereby permitting respondents to continue the use of skip-trace forms and materials which do not make the recipients aware of the true purpose for which the information is being requested . . ."

[3]Except for their participation in the stipulation of facts, Mohr and Floersheim presented no evidence at the show cause hearing.

The examiner concluded that the cards then being sold and distributed by petitioners fail to reveal the true purpose thereof, and "actually mislead and deceive the recipients to the extent that they do not know why the information is being requested." The examiner therefore recommended that paragraph 1 of the cease and desist order be modified as provided in the order to show cause, quoted above.[4]

On November 14, 1958, the Commission rendered an opinion in which it adopted the findings, conclusions, and recommendations of the hearing officer. On the same day the Commission ordered Docket No. 6236 reopened, and modified the order to cease and desist in the manner indicated. It is this order which is now under review.

Petitioners contend that on the showing made the Commission was without jurisdiction or authority to reopen the proceedings (4) for the purpose of modifying the cease and desist order in the manner indicated.

The Commission reopened the proceeding and modified the cease and desist order on the ground that the public interest so required. This is one of the two statutory grounds for reopening such a proceeding and modifying

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[4]Indicating the view that the public interest required reopening of the proceeding to make this change in the order, the examiner stated in his report:

> "Since the cards currently in use by Respondents have the tendency and capacity to mislead and deceive persons to whom they may be sent, and since Paragraph 1 of the Commission's outstanding order to cease and desist has given rise to confusion and controversy as to the compliance required, the public interest demands that said paragraph be revised to insure, beyond question, that such deception shall cease."

a cease and desist order where, as here, the time had expired for reviewing that cease and desist order.[5]

Two reasons were given why the public interest required the reopening and modification. One of these was that the outstanding cease and desist order had given rise to confusion and controversy as to the compliance required.

If supported by the record, this is sufficient to sustain the finding that public interest required the reopening and modification. The public interest requires that a cease and desist order be clear and explicit in all of its terms. Otherwise it is ineffective in correcting the abuses with which it is intended to deal, and is unfair to the parties charged with compliance.

The record, as summarized above, amply supports the Commission's assertion that the outstanding order had given rise to confusion and controversy. The Commission states that the original intention, to which it still adheres, was to require discontinuance of the use of forms "which do not make the recipients aware of the true purpose for which information is being requested." But petitioners interpret the original order as merely requiring that no false purpose be stated or implied.

That the Commission's general counsel originally interpreted the order in this same way is indicated by his

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[5]Under the stated circumstances, the reopening of such a proceeding is governed by the last sentence of section 5(b) of the act, 15 U. S. C. A., §45(b), which reads in part as follows:

"After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . ."

letter of August 1, (5) 1956, referred to above. In the Commission's brief filed in this review proceeding it is conceded that the cease and desist order is reasonably subject to the interpretation petitioners have given to it. In the face of this confusion and controversy as to the meaning of the original order, a clarification thereof would be in the public interest.

The second reason given by the Commission for requiring the reopening and modification was that the forms in current use by petitioners have the tendency and capacity to mislead and deceive persons to whom they may be sent.

Assuming that it is substantiated by the record, this too is a sufficient reason to support the finding that public interest required the reopening and modification. If experience with the forms in current use proved that they were deceptive, the public interest required that the proceeding be reopened and that the order be modified to prevent the use of such forms. Moreover, the statute is broad enough to authorize a requirement that the true purpose of the forms be affirmatively disclosed.[6]

The record also supports this reason for asserting that public interest required the action taken. The parties stipulated that of 700,000 forms sent out during a six-month period in 1958, 80,000 had been returned. The Commission could reasonably find, without the aid of evidence on the subject, that people do not ordinarily supply information when they know it will be used against them. See Bennett v. Federal Trade Commission, D. C.

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[6] L. Heller & Sons, Inc. v. Federal Trade Commission, 7 Cir., 191 F. 2d 954; Haskelite Manufacturing Corp. v. Federal Trade Commission, 7 Cir., 127 F. 2d 765.

Cir., 200 F. 2d 362. It was proper for the Commission to conclude from the substantial response to these forms that the effect of omitting an affirmative statement of purpose therefrom was to cause recipients to take action they would not otherwise have taken.[7]

The Commission also had before it the forms in actual use and was entitled to find from an examination of these forms that recipients would be thrown off guard as to the (6) true purpose of the forms. Such a finding based on examination of the forms does not require the support of oral testimony or other evidence. See Dejay Stores v. Federal Trade Commission, 200 F. 2d 865, at page 867.

The public interest in terminating deceptive practices, even though such practices result in bringing delinquent debtors to task, is not here specifically questioned. But in any event the Commission's implied finding to this effect will not be judicially overturned.[8]

One may wonder why, if the Commission's original intention was to require an affirmative disclosure of purpose, it did not find a more forthright way to say so in its original cease and desist order. But ineptness of expression in the original order would not stand in the way of reopening the proceeding and modifying the order. It would in fact dictate that the order be clarified.

If it be assumed, on the other hand, that the Commission's original intention was not what it now says it was, this would likewise be immaterial.[9] Experience under the

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[7] Indeed, it is apparent that petitioners have drawn the same conclusion; else they would not feel aggrieved by the requirement that the true purpose be revealed.

[8] See Dejay Stores, Inc. v. Federal Trade Commission, *supra*; Rothschild v. Federal Trade Commission, 7 Cir., 200 F. 2d 3?; Silverman v. Federal Trade Commission, 9 Cir., 145 F. 2d 751.

cease and desist order, as revealed by the stipulated facts, showed that mere elimination of specific statements from the forms was not enough to stop the deception. The Commission was entitled to change its mind, if that is what it has done, as to the kind of a cease and desist order which was necessary to protect the public interest. The record of the entire Commission proceedings, including the original hearing, is before us, and factually supports the order here under review.

Petitioners contend that the Commission is estopped to modify its original order by its asserted failure to act within a reasonable time after accepting petitioners' compliance report. In this connection it is called to our attention that the compliance report is dated July 26, 1956, and was accepted by the office of the chief counsel on August 1, 1956, whereas it was not until February 6, 1958, that the show cause proceeding was instituted. (7)

While the show cause proceeding was not instituted until the latter date, the Commission's compliance division began to question petitioners' compliance as early as October 2, 1956. In any event, however, section 5(b) of the act authorizes the Commission to reopen cease and desist proceedings and to alter, modify, or set aside such an order "at any time."[9] Hence estoppel could not be based upon passage of time, assuming that it could be, in any event, a defense available against the Commission.

The general counsel's letter of August 1, 1956, expressing satisfaction with the forms then being used by petitioners may have caused petitioners to acquiesce in the cease and desist order instead of seeking a review thereof.

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[9]See footnote 5.

But they no longer acquiesce in that order as modified and are now exercising the right to review that order. Hence they are not aggrieved by the fact that they may have been originally lulled into inaction by the general counsel's letter of August 1, 1956.

Petitioners assert that the Commission's examiner erred in overruling objections to the admission of evidence. The reference here is to the twelve witnesses called by the Commission, who testified that they could not determine from an examination of the cards what purpose was intended to be served by the forms.

Whether or not this evidence was admissible, it was not prejudicial. It added nothing that could not have been determined by the Commission from an examination of the forms. The items of evidence tending to support the finding of continued deception were the forms themselves and the stipulated facts concerning the substantial response which they brought.

The order of the Federal Trade Commission entered on November 14, 1958, in its Docket No. 6236 is affirmed, and it is directed that a decree be entered enforcing in whole the said order.

(Endorsed:) Opinion. Filed Nov. 16, 1959.

Paul P. O'Brien, Clerk. (8)

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No. 695

In the Supreme Court of the United States

OCTOBER TERM, 1959

MITCHELL S. MOHR, an Individual Trading and Doing Business as NATIONAL RESEARCH COMPANY, and SYDNEY FLOERSHEIM, an Individual Trading and Doing Business as S. FLOERSHEIM SALES COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 685

MITCHELL S. MOHR, an Individual Trading and Doing Business as NATIONAL RESEARCH COMPANY, and SYDNEY FLOERSHEIM, an Individual Trading and Doing Business as S. FLOERSHEIM SALES COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1-10) is reported at 272 F. 2d 401. The opinion of the Federal Trade Commission (R. 43-46)[1] has not yet been reported.

[1] References to the Transcript of Record printed in the court below are designated "R. ——").

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered November 16, 1959. Rehearing was denied on December 29, 1959. The petition for a writ of certiorari was filed on February 8, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Federal Trade Commission properly concluded that the public interest required reopening a cease and desist order proceeding to insure affirmative disclosure of the purpose of petitioner's debtor tracing forms in order to avoid misleading and deceiving the recipients.

STATUTE INVOLVED

The pertinent provision of the Federal Trade Commission Act (52 Stat. 111, 15 U.S.C. 45(b)) is set forth in the petition at p. 3.

STATEMENT

The petitioners are in the business of obtaining information about delinquent debtors for the benefit of creditors. Their method of operation is to send cards to the last known address of the delinquent requesting the desired information. In *Mitchell S. Mohr*, 52 F.T.C. 1466, the Commission found that the petitioners' cards were deceptive and misleading and on June 1, 1956, entered an order requiring the petitioners to cease and desist from

> [u]sing or placing in the hands of others for use, any form, questionnaire, or other material printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delirquent debtors; (R. 3-4).

The petitioners submitted revised forms to the Compliance Division of the Commission (R. 8-11) and were advised by the Commission's General Counsel on August 1, 1956, that these forms appeared to comply with the order (R. 13). However, it was soon found that the revised forms continued to create misunderstandings among recipients and the petitioners' counsel was informed by letters of October 2 and October 12, 1956, that the forms the petitioners were using and intended to use were being submitted to the Commission for a consideration of their adequacy under the cease and desist order (R. 140). By letters of February 13 (R. 141-142) and March 14, 1957 (R. 142-143), petitioners were informed that the Commission took the position that its order was broad enough to prohibit all forms which failed to state that they were for the purpose of debt collection and that continued use of the present forms would result in adverse action by the Commission.

When the petitioners nevertheless persisted in using the forms, the Commission on February 6, 1958, ordered petitioners to show cause why the outstanding order should not be modified to preclude the petitioners from

> [u]sing, or placing in the hands of others for use, any forms, questionnaires or other materials,

printed or written, which do not clearly reveal that the purpose for which the information is requested is that of obtaining information concerning delinquent debtors (R. 3-5).

After briefing and oral argument (R. 48-83), the Commission remanded the case to a hearing examiner to receive evidence on the question of whether, under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), "conditions of law or fact ha[d] so changed as to require [modification of the prior cease and desist order] or if the public interest" required such action (R. 18-19). After such hearing, the examiner certified the record to the Commission along with a recommended decision (R. 27-34) concluding that the cards being used by the petitioners tended to mislead and deceive recipients, and that, since confusion and controversy had arisen as to the compliance required by the outstanding cease and desist order, "the public interest demands that said paragraph be revised [in the manner proposed in the Commission's notice of February 6, 1958] to insure, beyond question, that such deception shall cease" (R. 34). The Commission unanimously agreed with the examiner's recommendation in an Opinion (R. 43-46) and Order (R. 42) issued on November 14, 1958. The Court of Appeals for the Ninth Circuit affirmed (Pet. App. 1-10).

ARGUMENT

The instant case presents no novel or significant question of law but only the application of established principles to a particular fact situation. It

has been uniformly held, in all circuits in which the matter has arisen, that the sale and distribution of "skip-trace" forms and cards of the type involved here constitute unfair or deceptive acts or practices in commerce within the prohibitions of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45 (a). See *National Clearance Bureau* v. *Federal Trade Commission*, 255 F. 2d 102 (C.A. 3); *DeJay Stores, Inc.* v. *Federal Trade Commission*, 200 F. 2d 865 (C.A. 2); *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362 (C.A.D.C.); *Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39 (C.A. 7), certiorari denied, 345 U.S. 941; *Silverman* v. *Federal Trade Commission*, 145 F. 2d 751 (C.A. 9). In a number of these cases, *National Clearance Bureau*;[2] *Bennett*; and *Rothschild*, all *supra*, the Commission, as in its modified order here, required an affirmative disclosure that the purpose of the cards was to collect debts. See *Haskelite Mfg. Corp.* v. *Federal Trade Commission*, 127 F. 2d 765 (C.A. 7).

It is equally well settled that the choice of a remedy and, accordingly, the scope of a cease and desist order, is particularly within the informed discretion of the Commission, and may, in appropriate circumstances, extend beyond prohibiting the precise illegal action existing in the past. See *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 355, 392-393; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission* v. *Ruber-*

[2] See *National Clearance Bureau*, F.T.C. Docket 6648, October 31, 1957, (not reported, but see CCH Trade Reg. Rep. 1957-1958 Transfer Binder), §26,830 at p. 36,105).

oid Co., 343 U.S. 470, 473; *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436. Where, as here, actual operation under a cease and desist order results in continuing deception as to the purpose of the inquiry being made through the petitioners' cards, a finding that the public interest requires its modification to prevent such deception is clearly appropriate. This is particularly true in view of the Commission's interpretation of its original order, of which the petitioners had been previously advised, as in fact requiring an affirmative disclosure of the purpose of the petitioners' forms. The petitioners contend that the record at the second hearing does not support the finding of continued deception. However, it is apparent, as the court below held (Pet. App. 10), that the forms themselves, as well as the stipulated fact that approximately 80,000 of the 700,000 forms sent to defaulting debtors during the first six months of 1958, were returned by the addressees (R. 137), provides adequate support for the Commission's finding, without reference to the testimony of the twelve witnesses to which petitioners objected. In any event, this is a purely factual question presenting no issue for review by this Court.

CONCLUSION

The decision below is correct and presents no question meriting further review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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March, 1960.

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